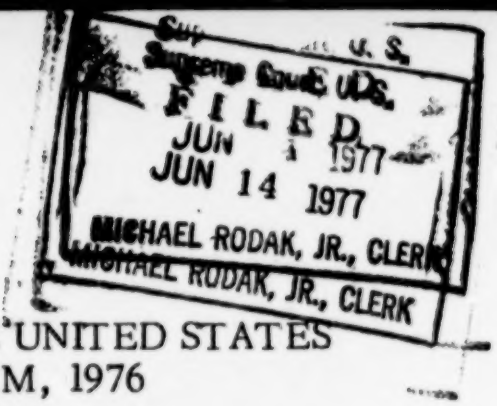


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No. 76-1784

THOMAS MUSTO and MICHAEL ASTARITA,

Petitioner,

-against-

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

EVSEROFF & SONENSHINE
Attorneys for Petitioners
186 Joralemon Street
Brooklyn, New York 11201

WILLIAM SONENSHINE
JEFFREY RABIN
Attorneys
Members of the Bar of the Supreme
Court of the United States

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ARGUMENT 6

POINT ONE

The lower court violated the petitioners constitutional rights when it denied them a hearing upon their motion to controvert an eavesdropping warrant.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No _____

THOMAS MUSTO and MICHAEL ASTARITA,

Petitioners,

-against -

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of New York, Appellate Division, First Judicial Department, entered in the above entitled matter on January 31, 1977.

## A. OPINION BELOW

The trial Court rendered two opinions below which are the subject of the instant proceeding. The first thereof was rendered by Mr. Justice Burton Roberts on December 8, 1975, wherein the original motion to controvert and suppress was denied. Said opinion (not officially reported) is appended to this petition as Appendix A.

Thereafter, a motion for reconsideration of the original motion was granted at which time the court adhered to it's original determination. This opinion (not officially reported), is appended hereto as Appendix B.

No opinion was rendered by the Appellate Court which unanimously affirmed the judgment below without opinion on January 31, 1977. That Court's order of affirmation of conviction is appended hereto as Appendix C.

No opinion was rendered by the New York Court of Appeals since that court denied permission to appeal to that court by its certificate dated March 16, 1977. A copy thereof is appended to this petition as Appendix D.

## B. THE GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment sought to be reviewed herein is the judgment of the Appellate Division, First Judicial Department of the Supreme Court of the State of New York, made on January 31, 1977 and appended hereto as Appendix C.

Jurisdiction in this Court is invoked under Title 28, United States Code, Section 1257 (2) and Rule 19, subdivision 1 of the rules of this Court.

## C. THE QUESTIONS PRESENTED FOR REVIEW

The trial court erred in refusing to grant a hearing upon defense counsel's request for a motion

to controvert the eavesdropping orders because of prejurious statements in the underlying affidavits submitted in support of said orders.

## D. THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The statutes involved are New York Criminal Procedure Law, § 710.10, 710.20, 710.40 and 710.60 and Amendments IV and XIV of the United States Constitution and Article 1, § 6 of the New York State Constitution.

The pertinent portions are set forth in Appendix E of this petition.

## E. A CONCISE STATEMENT OF THE CASE AND THE MATERIAL FACTS PERTAINING TO THE CONSIDERATION OF THE QUESTIONS PRESENTED.

Petitioners were convicted on April 28, 1976, upon their pre-trial plea of guilty to Promoting Gambling in the First Degree and Promoting Gambling

in the Second Degree before the Honorable Justice Roberts in the New York State Supreme Court, County of New York.

Prior to the entry of the plea of guilty extensive pretrial motions were made before Mr. Justice Roberts upon motions to controvert various eavesdropping warrants issued out of the Supreme Court of the State of New York, County of New York to suppress evidence of the conversations intercepted pursuant to said warrants. The warrants authorized both telephonic interception and "bugging" of oral communications.

The trial court denied each and every motion seeking to controvert the eavesdropping orders without granting the petitioners a hearing on the issues asserted.

Thereafter, all of these materials were the subject of a timely appeal to the Appellate Division, First Department of the Supreme Court of the State of New York. That Court, on January 31, 1977, unanimously

affirmed the judgment below without opinion. Thereafter, a timely application was made to the New York Court of Appeals seeking leave to Appeal to that Court. On March 16, 1977, the Honorable Justice Fuchsberg, an Associate Justice of the Court of Appeals denied permission to appeal to that Court.

Petitioners are presently incarcerated pursuant to said judgment of conviction.

F. THE STATES OF THE PROCEEDINGS IN WHICH THE ISSUES INVOLVED WERE RAISED AND THE MANNER IN WHICH THEY WERE RAISED.

The issue with respect to the validity of the eavesdropping warrants were raised by timely pretrial motions in accordance with the Criminal Procedure Law of the State of New York.

G. ARGUMENT AMPLIFYING THE REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

( See next Page )

## POINT ONE

### THE LOWER COURT VIOLATED THE PETITIONER'S CONSTITUTIONAL RIGHTS WHEN IT DENIED THEM A HEARING UPON THEIR MOTION TO CONTROVERT AN EAVES-DROPPING WARRANT

The petitioners by way of motions dated March 28, 1975 and September 25, 1975, sought to controvert a court ordered eavesdrop which resulted in the incerception of their conversations. It was the contention of petitioners that the affidavits submitted in support of said order contained perjurious allegations without which the orders would not have been granted. The court in a decision dated December 8, 1975, denied petitioners motion without a hearing holding that a sufficient factual basis had not been alleged to warrant a hearing.

The law in the State of New York pertaining to when a hearing on a motion to suppress or controvert should be granted is of somewhat recent vintage. The New York Court of Appeals on October 21, 1965, in the case of People v. Alfinito, 16 N.Y. 2d 181, 264 N.Y.S. 2d, 243, 211 N.E 2d 644, stated at page 245, 246;

> " There is no controlling authority in this State although perhaps People ex rel. Robert Simpson Co. v. Kempner ( 208 N.Y. 16, 23, 101 N.E. 794, 796, 46 L.R.A., N.S., 970) can be read as authorizing a later contest of the facts which were

' before the Magistrate when he signed the warrant. In other jusri-dictions there are decisions both ways. Some say that there is no authority for going behind the war-rant ( Johnson v. State 163 Tex. Cr. Rep. 101, 289 S.W. 2d 249; Armstrong v. State, 195, Miss. 300, 15 So. 2d 438; Burrell v. State. 207 Md. 278. 113 A. 2d 884; United States v. Burnett, Cir., 53 F. 2d 219, 225; Kenney v. United States, 81 U.S. App. D.C. 259, 157 F. 2d 442). Holdings or suggesting the contrary are such decisions as United States v. Nagle, 2 Cir., 34 F. 2d 952 and Kings v. United States, 4. Cir., 282 F 2d 398. In Rugendorg v. United States, 376, U.S. 528, 532, 84 S. Ct. 825, 827, 11 L. Ed. 2d 887, the Supreme Court seems to assume although not to hold, that such an attack on the underlying affidavit may be made Our comparatively new statutes (Code Crim. Proc., §§ 813-c, 813-d, 813-e, which set up procedures for motions for the return of property and suppressin of evidence alleged to have been obtained by unlawful search and seizure, do not speci-fically answer our question since their rather general language as to "unlawful search and seizure" and "property claimed to have been "unlawfully obtained: does not tell us whether it was intended to permit, on such a motion, a new inquiry into the facts set out in the affidavit for the search warrant.

**********

"We hold as follows: first, that § 813-c of the Code of Criminal Procedure is to to construed so as to permit an inquiry as to whether the affidavit's statements were perjurious; second, that the burden of proof is on the person attacking the warrant (see United States v. Goodwin, 9 Cir., 1 F 2d 36; United States v. Napela, 2 Cir., 28 F. 2d 898), and third, that any fair doubt arising from the testimony at the suppressal hearing as to whether the affidavit's allegations were perjurious should be resolved in favor of the warrant since those allegations have already been examined by a judicial officer in issuing a warrant."

The Peoples position was and still is that a hearing in a case such as this is only required when a defendant attacks the veracity of the affiant and not where the credibility of the source of the information is challenged. In support of this proposition the People cited to the State Appellate Courts the Alfinito decision and subsequent decisions such as People v. Slaughter, 37 N.Y. 2d 596 (1975); People v. Glen, 30 N.Y. 2d 252 (1972), cert.den. 409 U.S. 849, (1972) and People v. Solimine, 18 N.Y. 2d 477 (1966). The imposition of a standard such as this effectively precludes a defendant from satisfactorily attacking an affiant when his information and knowledge is based upon conversations with another.

In the instant matter the affiant was Ronald Goldstock, an assistant district attorney in the New York County District Attorney's

Office. Mr. Goldstock submitted his affidavit to the Lower Court in support of his application for an eavesdropping warrant wherein he sought to set forth sufficient probable cause for the issuance of said order. A reading of said affidavit indicates that Mr. Goldstock's facts were based upon conversations he had with other parties and not upon his personal knowledge. The petitioners could not challenge the veracity of the affiant because his affidavit was in all respects, truthful as far as he was concerned. The proper challenge must be to the facts and the source of the facts when one is alleging perjury and not to the individual who is merely reciting them.

The language of the New York Court of Appeals in each of the aforementioned decisions leaves little doubt that the permissable scope of when a hearing is authorized is so narrow that it infringes upon an accused's constitutional rights as guaranteed by the Fourteenth and Fourth Amendments of the United States Constitution. The Court held in said cases as follows:

> ."The detective's statement in this case asserted that a named informer, then confined in prison near the courthouse had told the officer that defendant, acting in concert with the informer, did burglarize certain business premises and did take a calculating machine and a barometer therefrom. The informer further stated that the machine and the barometer, as well as a pistol, were then in the unlawful possession of the

' defendant. According to the affidavit the named informer also stated that the items were located either at the home of the defendant, in his automobile or at his place of business, all of which were explicitly described by the informer and verified by the detective. Apart from general denials of the allegations made in the detective's affidavit, defendant avers that the aforementioned affidavit was based " entirely upon the hearsay statement of a confessed thief".

It is plain from a reading of defendant Solimine's affidavit that he is not attacking the veracity of the affiant detective, but rather the credibility of the named informer who was in prison. The only objection to the detective's affidavit is in connection with the source of the information contained therein, i. e. a confessed thief of the very articles for which the search warrant was issued. Otherwise Solimine's affidavit is barren of any facts which raise an issue respecting perjury. To warrant the relief requested, Solimine must throw doubt upon the truthfulness of the affiant's allegations. This he has failed to do". " Emphasis Added")

( PEOPLE v. SCLIMINE 18 N.Y. 2d 477, 479, 480, [1966] )

* * * * * * * * * * * * *

" The March motion was properly denied without a hearing. Before a hearing is required an issue of fact

"must be raised ( People v. Solimine, 18 N.Y. 2d 477, 276 N.Y.S. 2d. 882, 223 N.E. 2d 341). Generally, the burden on a motion to suppress is on a defendant ( People v. Berrios, 28 N.Y. 2d 361, 367, 321 N.Y.S 2d 884, 888, 270 N. E 2d 709, 712; People v. Alfinito, 16 N.Y. 2d 181, 264 N.Y.S. 2d 243, 256, 211 N.E. 2d 644, 646). The affidavits of Glen and his counsel do not dispute the facts in the warrant application, the veracity of the affiant, or the manner in which the property was seized. On the narrow question of law whether the affidavit in support on the warrant was sufficient, the motion was, therefore, correctly decided. "

( PEOPLE V. GLEN, 30 N.Y. 2d, 252, 262, [ 1973]

* * * * * * * * * * * * * * *

" As we held in People v. Solimine ( 18 N.Y. 2d 477, 276 N.Y.S. 2d 882, 223 N.E. 2d 341), a defendant is entitled to a hearing in which he may challenge the truthfulness of the allegations in the affidavit supporting a search warrant only where he attacks the veracity of the police officer affiant, and not where, as here, the credibility of the source of information is challenged ( People v. Solimine, 18 N.Y. 2d 477, 479, 276 N.Y. S. 2d 882, 883, 223, N.E. 2d 341, supra). Alfinito is only available to a defendant

" who claims that the affiant has perjured himself".

( PEOPLE v. SLAUGHTER)
37 N.Y. 2d 596, 600 [1975]

It is thus apparent that prosecutors throughout the State of New York can easily thwart any effort by an accused to challenge a Court Order by having the underlying affidavit drawn by a third party who merely recites the hearsay allegations of another.

The Court Order in question at this time is one signed by the Honorable Burton B. Roberts, Justice of the Supreme Court of the State of New York, County of New York, on September 26, 1973 and designated number 73/72. As previously indicated the affidavit submitted in support of the application for an eavesdrop was in the name of an assistant district attorney. The one substantive assertion in said affidavit which induced the Court to grant the order was that detailing an alleged conversation between Michael Astarita and an undercover police officer. The assertion in question stated:

" A police officer, sheild # 21590, who is currently acting in an undercover capacity has informed me that during the course of his official duties he has had occasion to meet Michael Astarita, and has been taken into his confidence with respect to his illegal gambling activities. Astarita told the officer early in September 1973, that he (Astarita) was about to operate a wire-

' room using a telephonic set-up which was designed to insulate him from the a action of law enforcement agencies. According to Astarita the set-up involves the use of two telephones which while located in apartment 2-B of 324 East 84th Street, New York City, are officially listed in Telephone Company records as having been installed in another premises. Thus, Astarita notes, should any investigating agency learn of the numbers 472-2990 and 472-2452, that would have been given to his customers to call and place their wagers, the agency would still be unable to discover the location of the wireroom, and seize the bookmaking records. I am further informed by the undercover police officer that Astarita disclosed that for bookmaking purposes, he maintained a third telephone in the wireroom (correctly listed) which would be used for outgoing calls, and the number of which would not be made available to customers."

The New York County District Attorney's Office conceded during argument before the Honorable Jacob Fuchsberg, Associate Justice of the New York State Court of Appeals, at which time leave to appeal to the New York Court of Appeals was being sought that without said allegation the Court order could not have been legally issued.

It was this specific allegation that was challenged by the petitioners as being perjurious. The moving papers which sought to controvert the orders stated the following:

" It is submitted that the conversation that the undercover police officer related to Mr. Goldstock never did take place and that if infact said officer did have any information, it was not as a result of any conversation with Michael Astarita. These allegations by the undercover police officer are based upon information and belief, investigation and conversations with the defendant perjurious, in that they did not infact take place. If in fact, said allegations were perjurious, there was insufficient probable cause to warrant the interception of conversations of Michael Astarita".

The Court in ruling that said allegation was insufficient held that "Facile statements by counsel, the source of which is enshrouded in claims of 'information and belief' and 'investigation' do not properly raise the perjury issue for a hearing (People v. Gilligan, 80 Misc. 2d 423, 427; People v. Childers, 54, Misc. 2d 1065, 1070)." What the Court neglected to consider was the statement that said facts were based upon conversations with the defendant wherein he denied having the conversation set forth in Mr. Goldstock's affidavit. What stronger factual statement could be presented than denial of the conversation to which it was alleged that the petitioner was a party.

In People v. Gilligan (supra) a case in which a warrant was attacked and a hearing sought based upon an alleged perjurious affidavit, defense counsel sought to show that it was incredible for a police

officer to state that he smelled the odor of marijuana. Concededly, this was mere conjecture by counsel and was not supported by any factual allegation. As the Court stated at page 765:

> " No facts are set forth, but only the belief of defendants' attorneys that the statement of the Tuscon officer that he smelled the odor of marijuana was incredible.... "

In People v. McDonough, supra, it was held at page 13, that:

> " However this Court is of the opinion that once an accused has been furnished with a copy of the order and affidavit, he must say more than ' I want a hearing' or' the statements in the affidavit are perjurious. ' The defendant's affidavit in support of a motion challenging a wiretap or eavesdrop must allege what statements were perjurious. "

Thus, it is evident that the aforementioned cases cited by the Court in its decision denying a hearing upon the question of perjurious statements wholly support petitioners position that a hearing should have been granted. The assertions in the defense motion were not mere supposition or conjecture but were based upon a denial of the petitioner Astarita that the alleged conversation took place. What better factual basis can be set forth than a denial by an alleged participant in a conversation that it took place.

All of the aforementioned cases used by the lower Courts to bolster its position in denying petitioners a hearing on the perjury issue when compared to the factual basis set forth in the defense moving papers do just the opposite and mandate that a hearing be held. The lower Courts thus erred in denying petitioners a hearing upon their application on either ground, to wit; that the moving papers failed to assert a factual basis sufficient to warrant a hearing or that a hearing is unwarranted in the instant case because the veracity of the affiant is not being challenged.

The unnecessarily restrictive nature of New York case law places an unconscionable burden upon an accused thus violating his constitutional rights. There must be a relaxing of the present standards so that an accused can be afforded a fair opportunity to establish an infringement upon his own constitutional rights.

## CONCLUSION

THE PETITION FOR CERTIORARI HEREIN SHOULD BE GRANTED

Dated: Brooklyn, New York
June , 1977

Respectfully submitted,

EVSEROFF & SONENSHINE
Attorneys for Petitioner

WILLIAM SONENSHINE, ESQ.
Of Counsel

APPENDIX A

SUPREME COURT NEW YORK COUNTY
TRIAL TERM PART 34

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THE PEOPLE OF THE STATE OF NEW YORK

-against-

THOMAS MUSTO and MICHAEL ASTARITA,

Defendants

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Indictment No. 4072/1974

BURTON B. ROBERTS, J.:

Defendant's motion directed to various aspects of the wiretapping in this case, which were returnable March 23, 1975 and September 25, 1975, are consolidated for decision.

Defendants have jointly moved for the following relief:

A. Suppression of evidence derived from wiretapping upon the grounds that the initial eavesdropping order, No 73/72, is not based upon sufficient probable cause to justify interception of the defendant Musto's conversations.

B. Controversion of the eavesdropping orders and suppression of the fruits thereof upon the grounds that an affidavit in support of the aforementioned order contains perjurious statements.

C. Suppression of evidence derived from wiretapping upon the grounds that certain Federal eaves-

dropping orders, from which the wiretapping in the instant case was allegedly derived, were based upon an insufficient showing of the necessity for eavesdropping.

The foregoing are decided as follows:

A. Sufficiency of the Probable Cause

The Fourth Amendment, as it relates to eavesdropping, requires probable cause to believe that a particular described person has committed, is committing or is about to commit a specific "designated offense" and that particularly described conversations constituting evidence of such offense will be obtained through electronic surveillance at the location where the eavesdropping is to occur ( Berger v. New York, 388 U.S. 41; CPL § 700.15). When the crime under investigation involves bookmaking, this requirement is satisfied when the facts alleged in support of the eavesdropping order warrant a man of reasonable caution to believe that named individuals are accepting bets over the subject telephones. ( People v. Gnozzo, 31 N.Y. 2d 134).

There is no challenge here to the sufficiency of the probable cause for the order in question as regards to the defendant Astarita. Briefly summarized, the supporting affidavits, dated Septemver 26, 1973, allege that in early September, 1973, Astarita, a known bookmaker with three of nine prior gambling arrests for the operation of telephone 'wirerooms' in Manhattan confided to an undercover officer of his plan to open another such establishment utilizing the premises and telephones which are the subject of the order. It is further alleged that on September 19 and 21, 1973, police officers monitoring a separate bookmaking wiretap overheard the subjects of that investigation call the telephone numbers which are the subject of the instant order and place "lay-of" bets

with two individuals, one of whom was referred to as "Michael"

The only contention raised by the defense is that there was insufficient probable cause to make the defendant Musto a subject of eavesdropping. Musto, the suppprting affidavit allege, was also a known bookmaker and a known associate of Astarita-- of Musto's four prior arrests for operating wirerooms, two occurred with Astarita. It is further alleged that on September 24, 1973, Musto was observed by the police leaving the subject premises at 2:06 p. m., a time alleged to be "precisely at the close of the bookmaking hours. Finally, it is alleged that the other individual who was overheard on the separate wiretap accepting lay-off bets over the subject telephone on September 19 and 21 along with "Michael", was named "Tommy". From the foregoing, it is clear that although the allegations pertaining to Astarita are stronger, probable cause did exist to believe that Musto was again Astarita's co-conspirator in the operation of this wireroom. Indeed, even if the allegations against Musto did not amount to probable cause, I would hold that the interception of his conversations was justified under the co-conspirator principle announced in United States v. Kahn (415 U.S.143). This branch of defendant's motion is therefore denied.

B. Allegations of Perjury

The right of a defendant to attack allegations in a warrant as perjurious is now elementary (People v. Alfinito, 16 N.Y.2d 181). Equally basic is the proposition that to obtain a hearing on the issue of perjury the defense, which has the burden of proof, must allege facts which throw doubt upon the veracity of the allegations in support of the warrant ( People v. Glen, 30 N.Y. 2d 252; People v. Solomine, 18 N.Y. 2d 477; CPL § 710.60).

The defendant's sole basis for the motion to controvert here is contained in a statement in an affirmation by their counsel. Referring to the conversation summarized heretofore in which Astarita is alleged to have told an undercover police officer the wireroom location and telephone numbers, counsel states: "These allegations by the undercover police officer are based upon information and belief, investigation and conversations with the defendant, perjurious, in that they did not in fact take place".

The foregoing statement is not a sufficient factual basis upon which to predicate a hearing. It is, in fact, not factual at all. Facile statements by counsel, the source of which is enshrouded in claims of "information and belief" and "investigation" do not properly raise the perjury issue for a hearing. ( People v. Gilligan, 80 Misc 2d 423, 427; People v. Childers, 54 Misc, 2d 752, 753 People v. McDonough, 51 Misc 2d 1070). Defendant's motion to controvert the warrant is therefore denied.

C. The Necessity to Eavesdrop

The Supreme Court in Berger v. New York (supra), held that the nature of eavesdropping requires a showing of ""special facts" or "exigent circumstances" which neccessitate the use of this tool of law enforcement. The statutory embodiment of this principle in both Federal and New York State law is the requirement of a showing that normal investigative procedures have been tried and failed, or reasonably appear to be unlikely to succeed if tried or to be too dangerous to employ (18 U.S.C. § 2518, subd. 3c; CPL § 700.15, subd. 4). The defense does not challenge the sufficiency of the series of wiretap orders directly involved herein on this basis. However, the defense does contend that a series of Federal eavesdropping orders, to which the

defendant Musto concededly has standing to object, was the source of the separate wiretap (referred to above) over which lay-off bets to "Michael" and "Tommy" were overheard, and that this Federal wiretap did not contain a showing of the requisite necessity for eavesdropping, thereby tainting instant orders. The People vigorously deny that the Federal eavesdropping, which terminated some five months prior to the tap which overheard the lay-off bets to "Michael" and "Tommy", can be considered the source of the latter because of the time span. The People also argue that even if the Federal tap was the source for this separate tap, the lay-off bets to "Michael" and "Tommy" were not really necessary to the probable cause here. There is merit in each of these arguments offered by the People. But the easiest answer is that the showing of necessity contained in the Federal eavesdropping applications is clearly adequate. Briefly summarized, these applications recount the limited information therefore obtained during that investigation using informants and physical surveillance, and recount in expert testimony the unlikelihood of effectively prosecuting the participants in such a large-scale telephone bookmaking operation without the use of wiretapping. These well-known difficulties are virtually a sufficient showing of necessity prima facie, "to inform the authorizing judge of the difficulties inhearing in the use of conventional techniques" ( United States v. King, 335, F. Supp. 523, 535, mod. 476 p. 28, 494; of United States v. Kahn, supra). This branch of defendant's motion is therefore denied.

Requests for "minimization" and "audibility" hearings referred to in the instant motion have heretofore been referred to the trial court.

This constitutes the order and decision of the Court.

The Clerk of the Court is directed to forward a

copy of this order to the attorneys for the defendants and to the Attorney General of the State of New York

Dated: December 8, 1975

J..S. C.

APPENDIX B

SUPREME COURT NEW YORK COUNTY
TRIAL TERM PART 34

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THE PEOPLE OF THE STATE OF NEW YORK

- against -

THOMAS MUSTO and MICHAEL ASTARITA,

Defendants.

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Indictment No. 4072/1974

BURTON B. ROBERTS, J. :

Defendants move to reargue a motion to controvert certain eavesdropping orders and suppress evidence derived therefrom. Said motion was heretofore denied by this Court by an order dated December 8, 1975.

Upon reading the affirmation of Jeffrey A. Rabin, Esq., dated December 29, 1975, and the answering affidavit of Assistant District Attorney Harvey Weinberg, sworn to January 26, 1976, and all prior papers and proceedings had pursuant to the original motion, the motion to reargue is denied and the original decision is adhered to for the following reasons:

1. Defendants' motion papers fail to demonstrate "that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the [original] motion" (CPL § 710. 40, subd. 4).

2. Mr. Rabin's affirmation fails to contain allegations which, if true, are sufficient to carry defendants'

burden of demonstrating perjury (People v. Alfinito, 16 N. Y. 2d 181 ). One allegation of perjury hinges upon whether, with respect to affidavit # 73/69, the vantage point the police officers said they used afforded them a view of what they said they saw. Mr. Rabin does not dispute the officers' ability to observe, but rather implies that such observation would have been difficult but not impossible because of the angles involved. The other allegation contained in Mr. Rabin's affirmation is that an unnamed employee of the tenant of the office where the police officers purportedly made their observations would testify that such observations never took place. This allegation is so vague and the omnipresence of such an individual is so incredible that it, too, is worthless as the predicate for a hearing.

3. As this Court has previously stated, the eavesdropping order which defendants seek to controvert (#73/69 ) is incidental and not necessary to the probable cause for the orders which the District Attorney intends to use in this case.

This constitutes the decision and order of the Court.

The Clerk of the Court is directed to forward a copy of this order to the attorneys for the defendants and to the District Attorney of New York County.

Dated: March 3, 1976

BURTON B. ROBERTS
J.S.C.

APPENDIX C

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on January 31, 1977.

Present-Hon. Francis T. Murphy, Jr Justice Presiding
Samuel J. Silverman
Myles J. Lane
Paul J. Yesawich, Jr. Justices

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4016

THE PEOPLE OF THE STATE OF NEW YORK,

Respondents,

-against-

THOMAS MUSTO,

Defendant-Appellant.

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Order of Affirmance on Appeal from Judgment

An appeal having been taken to the Court by the defendant-appellant from the judgment of the Supreme Court, New York County (B. Roberts, J.) rendered on July 28, 1976, convicting defendant, upon his plea of guilty, of promoting gambling in the first degree and promoting gambling in the second degree.

and said appeal having been argued by Mr. William Sonenshine

of counsel for the appellant, and by Mr. Brian Rosner

of counsel for the respondent ; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50 (5).

ENTER

JEROME L. REINSTEIN

Deputy Clerk

Counsel for appellant is referred to § 606.5, Rules of the Appellate Division, First Department

## APPENDIX D

STATE OFNEW YORK
COURT OF APPEALS

BEFORE: HON. JACOB D. FUCHSBERG,
Associate Judge

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THE PEOPLE OF THE STATE OF
NEW YORK,

-against -

THOMAS MUSTO and MICHAEL ASTARITA,

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### CERTIFICATE DENYING LEAVE

I, JACOB D. FUCHSBERG, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460. 20 and upon the record and proceedings herein, [*] there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated: at New York, New York
March 16, 1976

JACOB D. FUCHSBERG
Associate Judge

[*]Description of Order: Order of App. Div. First Department entered January 31, 1977, affirming judgment of Supreme Court, New York County, rendered July 28, 1976.

## APPENDIX - E

§ 710.10

### MOTION TO SUPPRESS EVIDENCE DEFINITION OF TERMS

As used in this article, the following terms have the following meanings:

1. " Defendant" means a person who has been charged by an accusatory instrument with the commission of an offense.

2. "Evidence", when referring to matter in the possession of or available to a prosecutor, means any tangible property or potential testimony which may be offered in evidence in a criminal action.

3. "Potential testimony" means information or factual knowledge of a person who is or may be available as a witness.

4. "Eavesdropping" means either "wiretapping" or "mechanical overhearing of a conversation", as those terms are defined in §250.00 of the penal law.

5. "Aggrieved". An "aggrieved person" includes, but is in no wise limited to, an "aggrieved person" as defined in subdivision two of section forty-five hundred six of the civil practice law and rules.

§ 710.20

### MOTION TO SUPPRESS EVIDENCE; IN GENERAL; GROUNDS FOR.

Upon motion of a defendant who (a) is aggrieved by unlawful or improper acquisition of evidence and has reasonable cause to believe that such may be offered

against him in a criminal action, or (b) claims that improper identification testimony may be offered against him in a criminal action, a court may, under circumstances prescribed in this article, order that such evidence be suppressed or excluded upon the ground that it:

1. Consists of tangible property obtained by means of an unlawful search and seizure under circumstances precluding admissibility thereof in a criminal action against such defendant; or

2. Consists of a record or potential testimony reciting or describing declarations or conversations overheard or recorded by means of eavesdropping, obtained under circumstances precluding admissibility thereof in a criminal action against such defendant; or

3. Consists of a record or potential testimony reciting or describing a statement of such defendant involuntarily made, within the meaning of §60. 45, to a puclic servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him; or

4. Was obtained as a result of other evidence obtained in a manner described in subdivisions one, two and three; or

5. Consists of potential testimony regarding an observation of the defendant either at the time or place of commission of the offense or upon some other occasion relevant to the case, which potential testimony would not be admissible upon the prospective trial of such charge owing to an improperly made previous

identification of the defendant by the prospective witness. ( Effective 2/25/76)

§ 710. 40

MOTION TO SUPPRESS EVIDENCE; WHEN MADE AND DETERMINED.

1. A motion to suppress evidence must be made after the commencement of the criminal action in which such evidence is allegedly about to be offered, and except as otherwise provided in § 710. 30 and in subdivision two of this section, it must be made within the period provided in subdivision one of section 255. 20. ( Effective 9/1/74).

2. The motion may be made for the first time, when, owing to the unawareness of facts constituting the basis thereof or to other factors, the defendant did not have reasonable opportunity to make the motion previously, or when the evidence which he seeks to suppress is of a kind specified in § 710. 30 and he was not served by the people, as provided in said section 710. 30, with a pre-trial notice of intention to offer such evidence at the trial. (Eff. 9/1/76)

3. When the motion is made before trial, the trial may not be commenced until determination of the motion; except that in the case of a pre-trial motion made in a local criminal court, such court, must, upon request of the people, determine it during trial.

4. If after a pre-trial determination and denial of the motion the court is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, it may permit him to renew the motion

before trial or, if such was not possible owing to the time of the discovery of the alleged new facts, during trial.

§ 710.60

## MOTION TO SUPPRESS EVIDENCE; PROCEDURE

1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.

2. The court must summarily grant the motion if: (a) The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or

(b) The people stipulate that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

3. The court may summarily deny the motion if:

(a). The motion papers do not allege a ground constituting legal basis for the motion; or

(b) The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision three of section 710. 20.

4. If the court does not determine the motion pursuant to subdivision 2 or 3, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath, except that unsworn evidence pursuant to subdivision 2 of § 60. 20 of this chapter may also be received. Upon such hearing, hearsay evidence is admissible to establish any material fact. ( Effective 6/21/75)

5. A motion to suppress evidence made during trial may be in writing and may be litigated and determined on the basis of motion papers as provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in subdivision four, out of the presence of the jury if any, and make findings of fact essential to the determination of the motion.

6. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

CONSTITUTION OF THE U.S.

AMENDMENT [ IV ]

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

CONSTITUTION OF THE U.S.

AMENDMENT [ XIV]

*** No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. ***

ARTICLE I, § 6

*** No person shall be deprived of life, liberty or property without due process of law. ***